

1 BEFORE NANCY KEENAN, SUPERINTENDENT OF PUBLIC INSTRUCTION  
2 STATE OF MONTANA

3 \* \* \* \* \*

4 IN THE MATTER OF THE NORTHERN )  
5 CHEYENNE PETITION TO CREATE A ) OSPI 195-91  
6 NEW HIGH SCHOOL DISTRICT )

7 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

8 \* \* \* \* \*

9 On January 15, 1991, a petition to create a new high school  
10 district pursuant to § 20-6-325, Montana Code Annotated (MCA),  
11 was filed with the Rosebud and Big Horn County Superintendents of  
12 Schools. The Big Horn and Rosebud County Superintendents of  
13 Schools held hearings on the petition on February 20, 21 and 22,  
14 1991. Proponents and opponents testified, and documents, written  
15 comments and written testimony were received and admitted as  
16 exhibits.

17 The proposed new district boundaries include land within  
18 both Rosebud and Big Horn Counties. The proposed district would  
19 include all of Elementary School District No. 6 (Lame Deer), all  
20 of Elementary School District No. 3 (Birney), all of Elementary  
21 School District No. 17K (Big Bend), that portion of Elementary  
22 School District No. 17H (Hardin) which lies within the boundaries  
23 of the Northern Cheyenne Indian Reservation in Big Horn County,  
24 and that portion of Elementary School District No. 32J (Ashland)  
25 which lies within Rosebud County. The proposed district would  
also include portions of land contained within existing High

1 School District No. 19 (Colstrip) in Rosebud County and existing  
2 High School District No. 1 (Hardin) in Big Horn County.

3 On May 28, 1991, the Rosebud County Superintendent of  
4 Schools denied the petition to create the new high school  
5 district. The Big Horn County Superintendent of Schools denied  
6 the petition on July 2, 1991. Both decisions were appealed under  
7 § 20-6-325, MCA, to the State Superintendent of Public  
8 Instruction.

9 The State Superintendent of Public Instruction issued and  
10 served a NOTICE OF HEARING consolidating the appeals on August 2,  
11 1991, and setting a hearing for August 27, 1991. Counsel of  
12 record for the affected parties agreed to continue the hearing to  
13 a date to be determined at a prehearing conference to be held no  
14 later than November 30, 1991. On December 17, 1991, this State  
15 Superintendent of Public Instruction appointed James M. Scheier,  
16 Assistant Attorney General, as the hearing examiner.

17 The administrative hearing on the consolidated appeals was  
18 held on September 23, 1992, in Billings, Montana. The hearing  
19 examiner issued his FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
20 PROPOSED ORDER on May 6, 1993. The Superintendent of Public  
21 Instruction issued a NOTICE OF OPPORTUNITY TO FILE EXCEPTIONS,  
22 BRIEFS AND TO PRESENT ORAL ARGUMENT on May 12, 1993. Oral  
23 argument was heard on August 2, 1993. Following oral argument,  
24 this matter was deemed submitted and ready for decision.

25 This Superintendent of Public Instruction, having considered

1 the record of the hearing before the Rosebud and Big Horn County  
2 Superintendents, the record before the hearing examiner, the  
3 hearing examiner's FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
4 PROPOSED ORDER, the exceptions and briefs filed in support and  
5 opposition, and the oral arguments of the affected parties, now  
6 enters the following:

#### 7 STANDARD OF REVIEW

8 This State Superintendent of Public Instruction finds the  
9 rationale adopted by the hearing examiner in regard to the  
10 standard of review on appeal persuasive. Section 20-6-325(4),  
11 MCA, requires the State Superintendent to review an appeal of a  
12 petition for the creation of a new high school district de novo.  
13 That section states in pertinent part:

14 (4) The county superintendent's order may be  
15 appealed to the superintendent of public instruction  
16 within 30 days after the date of such order. An appeal  
17 must be in writing and be signed by not less than 10  
18 residents of the proposed new district. The  
19 superintendent of public instruction shall:

20 (a) call a hearing on the appeal not less than 20  
21 days or more than 30 days from receipt of the appeal;

22 (b) provide notice of the hearing in the manner  
23 prescribed in subsection (2)(c);

24 (c) consider the material presented at the county  
25 superintendent's hearing and pertinent other material;  
and

(d) render a decision on the creation of such new  
high school district. The decision is final.

#### 26 ADMISSIBILITY OF EXHIBITS

27 This State Superintendent adopts the ruling of the hearing  
28 examiner on the exhibits and overrules objections to Colstrip  
29 School District's Exhibits C, D, and E and deems them admitted;

1 sustains objections to Colstrip School District's Exhibit F and  
2 Hardin School District's Exhibit D and deems them denied.

3                   EXCEPTIONS TO HEARING EXAMINER'S  
4 FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED ORDER

5           Section 2-4-621(3), MCA, sets forth the standard of review  
6 which this State Superintendent must use in reviewing the hearing  
7 examiner's FINDINGS OF FACT, CONCLUSIONS OF LAW AND PROPOSED  
8 ORDER:

9           The agency may adopt the proposal for decision as  
10 the agency's final order. The agency in its final  
11 order may reject or modify the conclusions of law and  
12 interpretation of administrative rules in the proposal  
13 for decision but may not reject or modify the findings  
14 of fact unless the agency first determines from a  
15 review of the complete record and states with  
16 particularity in the order that the findings of fact  
17 were not based upon competent substantial evidence or  
18 that the proceedings on which the findings were based  
19 did not comply with essential requirements of law. The  
20 agency may accept or reduce the recommended penalty in  
21 a proposal for decision but may not increase it without  
22 a review of the complete record.

23           Rosebud County High School District No. 19 (Colstrip) and  
24 Hardin Public School District filed exceptions to the hearing  
25 examiner's findings of fact. This Superintendent denies the  
Districts' exceptions and hereby ADOPTS the hearing examiner's  
FINDINGS OF FACT AND CONCLUSIONS OF LAW. There is substantial,  
credible evidence to support each of the findings of fact. The  
conclusions of law are not affected by error of law.

23           Evaluation of the Evidence under House Bill 667 (Ch. 633, 1993  
24 Montana Session Laws [hereinafter "HB 667"]):

25           Section 2-4-612 (7), MCA, states that: "The agency's

1 experience, technical competence, and specialized knowledge may  
2 be utilized in the evaluation of evidence." House Bill 667 was  
3 enacted by the 1993 Legislature and became effective on July 1,  
4 1993. This piece of school funding legislation was adopted after  
5 the administrative hearing held in September 1992. Neither party  
6 addressed this legislation in oral argument on August 2, 1993.  
7 It is this State Superintendent's opinion that the evaluation of  
8 the evidence utilizing the facts found by the hearing examiner as  
9 applied to HB 667 will provide the best information on which to  
10 make a sound judgment about whether financial resources would be  
11 available to operate the proposed new high school district.

12 Therefore, this Superintendent used HB 667 to evaluate the  
13 evidence presented in this matter as reflected in the adopted  
14 findings of fact. The results of the evaluation are included in  
15 the DISCUSSION section that follows.

16 ORDER

17 The hearing examiner's PROPOSED ORDER is hereby modified as  
18 follows:

19 1. The decision of the Rosebud County Superintendent of  
20 Schools dated May 28, 1991, denying the petition is hereby  
21 REVERSED.

22 2. The decision of the Big Horn County Superintendent of  
23 Schools, dated July 2, 1991, denying the petition is hereby  
24 REVERSED.

25 3. The boundaries of the new high school district will

1 coincide with the boundaries defined in the petition.

2 4. The petition to create a new high school district in or  
3 near Lame Deer, Montana, is GRANTED CONTINGENT on the land to  
4 which the permanent high school facility is attached being deeded  
5 to the local public school district.

6 DISCUSSION

7 The question before this Superintendent is:

8 Whether it is advisable and in the best interests of the  
9 residents of the proposed new high school district to create the  
10 new district. This State Superintendent concludes that it is  
11 advisable and in the best interests of the residents of the  
12 proposed new high school district to create the new district for  
13 the following reasons:

14 a. Creation of the new district will most likely have a  
15 positive impact on the current unacceptably high dropout rates  
16 among Native American students within the proposed new district.

17 While there was conflicting testimony over the precise  
18 student dropout rates, the evidence does suggest that there is a  
19 significantly higher dropout rate among Native American students  
20 at three of the four available high schools in the area  
21 surrounding the Northern Cheyenne Reservation, than among non-  
22 Native American students. In addition, the testimony presented  
23 by the appellants' experts to the effect that establishment of a  
24 community-based high school in Lame Deer would contribute to a  
25 reduction in the dropout rate was essentially unrefuted by the

1 respondents.

2       b. Creation of the new district will, on the whole, reduce  
3 distances students will need to travel to attend school and  
4 extracurricular activities, and will also facilitate  
5 participation by parents in school activities.

6       Many students living within the proposed district currently  
7 must travel long distances, in sometimes poor weather and road  
8 conditions, to attend one of the four high schools available.  
9 From Lame Deer, by the shortest practical route, Busby High  
10 School is located 16.4 miles to the west, St. Labre Indian School  
11 is located 19.9 miles to the east, Colstrip High School is  
12 located 22.9 to 25.3 miles to the north, and Hardin High School  
13 is located 58.7 miles to the west. From Busby, by the shortest  
14 practical route, Colstrip High School is located 39.3 miles to  
15 the east and north, and Hardin High School is located 42.3 miles  
16 to the west.

17       For some, this results in inability or impracticality of  
18 participation by both students and parents in school activities,  
19 anxiety for parents of the students, student fatigue, and added  
20 transportation expenses or difficulties under certain  
21 circumstances. Creation of the new district would not eliminate  
22 this problem for all students living in the area encompassed by  
23 the proposed new district. However, creation of a new district  
24 with the high school located in Lame Deer, where nearly half of  
25 the reservation population resides would, on the whole, reduce

1 the aggregate distances travelled by students attending the new  
2 school, thereby potentially eliminating or reducing some of the  
3 transportation problems currently experienced by these students.  
4 It would also make the school more accessible to parents of  
5 students, allowing them to participate in various school  
6 activities.

7 c. Creation of the new district will better effectuate  
8 Montana's constitutional commitment to preserve the cultural  
9 integrity of Native Americans.

10 Hardin High School and Colstrip High School are making  
11 serious efforts to offer an education for Native American  
12 students that fulfills the Montana constitutional requirements  
13 concerning the preservation of the cultural integrity of Native  
14 Americans, including the Northern Cheyenne. However, a high  
15 school located in Lame Deer, with its proposed curriculum  
16 offering specific courses in Northern Cheyenne language and  
17 culture, would most likely better implement the constitutional  
18 requirements.

19 d. The appellants have presented a detailed, viable plan to  
20 fund the various costs associated with creation and operation of  
21 the new district.

22 (1) Operating Funds.

23 The appellants' projections of revenues and operating costs  
24 appear to be realistic. The proposed new district can most  
25 likely be operated within the budget parameters projected by the



1 appellants' experts. The evaluation of the evidence of the  
2 impact of HB 667 also supports this conclusion.

3 The testimony presented to the hearing examiner on September  
4 23, 1992, based the fiscal review of the proposal on tax year  
5 1990 and school year 1990-1991 information. From tax year 1990  
6 to tax year 1993, the taxable valuation of the territory in the  
7 proposed district has increased from \$1,641,096 to approximately  
8 \$1,986,000 (Hearing Examiner's Finding of Fact No. 11). The new  
9 taxable valuation is an approximation because District 17K in Big  
10 Horn County has consolidated into District 17H and the property  
11 within the former 17K is no longer reported separately.

12 The creation of the new high school district will have a  
13 minimal effect on the tax base and revenue-generating capacities  
14 of the Colstrip and Hardin High School Districts. The creation  
15 of the new district will reduce the taxable valuation of each  
16 district by approximately one percent (1%).

17 Under the school funding formula in place for 1993-1994 and  
18 beyond, the proposed district will receive direct state aid and  
19 a guaranteed tax base (GTB) payment from the state to bring the  
20 district's tax wealth up to the statewide average. Assuming that  
21 the district's general fund budget will be set at the BASE budget  
22 level, or 80% of the maximum general fund budget, and that the  
23 Northern Cheyenne high school district enrolls 200 students in  
24 its first year, the district's general fund budget would be  
25 \$936,040, or \$25,497 less than the budget proposed to the hearing

1 examiner (Hearing Examiner's Finding of Fact No. 39).

2 To fund this general fund budget, the district would receive  
3 a direct state aid payment of \$468,020. To fund the remaining  
4 \$468,020, the district would need to levy \$71,953 against its tax  
5 base which would be matched by \$396,067 in guaranteed tax base  
6 aid from the state.

7 As a result of House Bill 667, the district is no longer  
8 allowed to use P.L. 81-874 monies to fund its general fund  
9 budget. To generate \$71,953 from its property tax base, the  
10 district would have to levy 36.23 mills. If the taxable  
11 valuation of the proposed district is something higher than  
12 \$1,986,000, the revenue generated from the district tax base will  
13 be greater and the state GTB less, but the 36.23 mills will not  
14 change. This conclusion assumes that the district has no sources  
15 of general fund revenue other than the property tax levy and  
16 state GTB aid, when in fact, the district would have a small  
17 amount of motor vehicle fees and possibly some investment  
18 earnings available to reduce its mill levy.

19 A general fund levy of 36.23 mills is a 30.79 mill increase  
20 over the 5.44 mills that taxpayers in the Colstrip High School  
21 district were paying for the 1990-1991 school year (Hearing  
22 Examiner's Finding of Fact No. 43). However, relative to other  
23 high school districts in Montana, 36 mills is not an unusually  
24 high levy, although this level is more common in larger urban  
25 districts than in smaller districts.

1 (2) Establishment of Permanent Facilities.

2 Petitioners intend to rely on federal funding to construct  
3 the new high school facility at Lane Deer. They presented  
4 testimony that it is likely that the proposed new district could  
5 achieve a high funding priority under P.L. 81-815 funds. If  
6 those funds are not available, petitioners will seek funding for  
7 the construction through a direct Congressional appropriation.  
8 It would have been preferable to have a firm commitment of funds  
9 for the construction of the new permanent high school facility  
10 prior to the granting of the petition to create the new district.  
11 However, only an existing district may submit an application for  
12 P.L. 81-815 funds for the construction of a new high school  
13 facility. Therefore, this Superintendent has granted the  
14 petition to create the new high school district.

15 This Superintendent agrees with the petitioners' statement  
16 that, because of the low tax base in the proposed district, it  
17 "would not be feasible" to raise funds to construct the buildings  
18 necessary for the district through local property tax levies.  
19 The evaluation of the evidence of the impact of HB 667 also  
20 supports this conclusion.

21 House Bill 667 created a school facility reimbursement to  
22 help low-wealth districts meet debt service payments on bonds  
23 issued for construction of school facilities. To be eligible for  
24 the school facility reimbursement, a district must sell bonds and  
25 have a debt service payment. Therefore, state assistance for

1 school facilities would be available to the new high school  
2 district only if it were to finance the construction of a new  
3 facility through the sale of school bonds.

4       Given an estimated enrollment of 200 high school ANB, House  
5 Bill 667 would allow the proposed school district to issue school  
6 bonds of up to \$4,124,000. At current interest rates, a school  
7 district could expect to pay \$425,000 annually to service the  
8 debt over 20 years on a \$4,124,000 bond issue. The school  
9 facility entitlement, calculated in accordance with § 20-9-  
10 370(1), MCA, for a high school of 200 ANB is \$66,000. Based on  
11 the available tax base and 200 ANB, the state's share of that  
12 entitlement would be approximately \$51,700, leaving \$373,300 to  
13 be raised from district taxpayers to service the annual debt  
14 payment. To generate, \$373,300 from the local tax base would  
15 require an unrealistic mill levy of 188 mills.

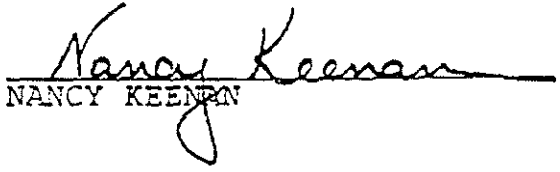
16       To the extent that the Northern Cheyenne High School  
17 district would have to rely on modular classrooms in the short-  
18 term, the district appears to have the financial ability to spend  
19 \$141,108 to lease these temporary facilities (Hearing Examiner's  
20 Finding of Fact No. 49). The district will have a P.L. 81-874  
21 fund that it can use to cover the expenditures associated with  
22 leasing modular classrooms. If the estimate of \$713,000 of P.L.  
23 81-874 funding available to the district is accurate, the  
24 district will have the funds available to meet the lease costs  
25 associated with operating the new district.

1 While temporary facilities may be sufficient for the short-  
2 term, the success of this school district in the long term  
3 depends on the district obtaining sufficient funds to build a  
4 permanent high school. The facility must meet the Board of  
5 Public Education's accreditation standard for school facilities.  
6 (Rule 10.55.2001, Administrative Rules of Montana.)

7 e. Creation of the new district will result in a high  
8 school "established and maintained under the laws of the state of  
9 Montana," and viewed as an integral part of the community.

10 Neither the Bureau of Indian Affairs contract high school at  
11 Busby nor St. Labre High School are "operating high schools"  
12 within the definition of § 20-6-325, MCA. Only the Colstrip High  
13 School and the Hardin High School are Montana public high  
14 schools.

15 DATED this 9th day of November, 1993.

16  
17   
18 NANCY KEENAN

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## 1 CERTIFICATE OF SERVICE

2 THIS IS TO CERTIFY that on this 9th day of November, 1993,  
3 a true and exact copy of the foregoing FINDINGS OF FACT,  
4 CONCLUSIONS OF LAW AND ORDER was mailed, postage prepaid, to the  
5 following:

6 Archibald S. Alexander  
7 8777 Sypes Canyon Road  
8 Bozeman, MT 59715

Lawrence R. Martin  
FELT, MARTIN, FRAZIER & LOVAS  
P.O. Box 2558  
Billings, MT 59103-2558

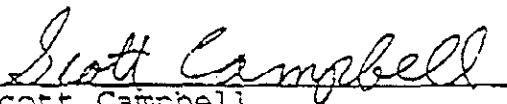
9 James H. Goetz  
10 GOETZ, MADDEN & DUNN  
11 35 North Grand  
12 Bozeman, MT 59715

Gary L. Day  
LUCAS & MONAGHAN  
513 Main Street  
Miles City, MT 59301-0728

13 James M. Scheier  
14 DEPT. OF JUSTICE  
15 Agency Legal Srv. Bur.  
16 P.O. Box 201401  
17 Helena, MT 59620-1401

Sharyn Thomas  
ROSEBUD COUNTY SUPT. OF SCHLS.  
P.O. Box 407  
Forsyth, MT 59327

18 Robert Harlin  
19 BIG HORN COUNTY SUPT. OF SCHLS.  
20 Drawer H  
21 Hardin, MT 59034

22   
23 Scott Campbell  
24 Paralegal Assistant  
25 Office of Public Instruction